

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v Brar (No 2) [2012] FCAFC 66

Citation: Minister for Immigration and Citizenship v Brar (No 2) [2012] FCAFC 66

Appeal from: Brar v Minister for Immigration & Anor [2011] FMCA 435

Parties: **MINISTER FOR IMMIGRATION AND CITIZENSHIP v MANJINDER SINGH BRAR and MIGRATION REVIEW TRIBUNAL**

File number: NSD 1370 of 2011

Judges: **NORTH, GREENWOOD AND BESANKO JJ**

Date of judgment: 9 May 2012

Catchwords: **PRACTICE AND PROCEDURE** – Costs – discretion to award – whether to issue an unsuccessful respondent on appeal a costs certificate – *Federal Proceedings (Costs) Act 1981* (Cth), s 6.

Held: the first respondent should be granted the costs certificate sought.

Legislation: *Federal Proceedings (Costs) Act 1981* (Cth) s 6
Migration Act 1958 (Cth) s 108
Migration Regulations 1994 (Cth) Schedule 4

Cases cited: *Minister for Immigration and Citizenship v SZNVW* (No 3) [2010] FCAFC 102
Minister for Immigration and Citizenship v Khadgi (No 2) [2010] FCAFC 152

Date of hearing: 15 November 2011

Place: Adelaide (Heard in Sydney)

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 7

Counsel for the Appellant: Mr N Williams SC and Mr T Reilly

Solicitor for the Appellant: Sparke Helmore

Counsel for the First
Respondent:

Mr J Young

Solicitor for the First
Respondent:

Shamser Thapa & Associates

Counsel for the Second
Respondent:

The Second Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1370 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
 Appellant**

**AND: MANJINDER SINGH BRAR
 First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: NORTH, GREENWOOD AND BESANKO JJ

DATE OF ORDER: 9 MAY 2012

WHERE MADE: ADELAIDE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The first respondent be granted a certificate to the effect that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under the *Federal Proceedings (Costs) Act 1981* (Cth) to the first respondent. This payment will be in respect of the costs incurred by him in relation to the appeal and any costs incurred by the Minister in relation to the appeal that are required to be paid by the respondent pursuant to order 4 made by this Court on 21 March 2012.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Appellant

AND: **MANJINDER SINGH BRAR**
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGES: **NORTH, GREENWOOD AND BESANKO JJ**

DATE: **9 MAY 2012**

PLACE: **ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 1 On 21 March 2012, this Court delivered judgment and made orders in the appeal by the appellant: *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30. The orders made by the Court were as follows:

1. 1. The appeal be allowed.
2. 2. The declarations and orders made by the Federal Magistrates Court on 28 July 2011 be set aside.
3. 3. The proceeding be remitted to the Federal Magistrates Court for hearing and determination of the remaining grounds of the applicant's amended application dated 17 May 2011, being grounds 1, 2, 5, 6, 7, 9 and 10 and the costs of that application including costs to date.
4. 4. The respondent pay the appellant's costs of the appeal.

2 2 After these orders were made, the respondent made an application for a costs certificate in respect of the appeal under s 6(1) of the *Federal Proceedings (Costs) Act 1981* (Cth). Section 6 of that Act relevantly provides:

- (1) Subject to this Act, where a Federal appeal succeeds on a question of law, the

Court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal.

(2) ...

(3) The certificate that may be granted under subsection (1) or subsection (2) by a Court to a respondent to a Federal appeal is a certificate stating that, in the opinion of the Court, it would be appropriate for the Attorney General to authorise a payment under this Act to the respondent in respect of:

- (a) The costs incurred by the respondent in relation to the appeal; and
- (b) Any costs incurred by an applicant in relation to the appeal that have been, or are required to be, paid by the respondent to the appellant in pursuance of an order of the Court, not being costs to which a costs certificate granted under s 7 related.

3 3 This is a Federal appeal (see paragraph (fa) of the definition of “Federal appeal” in s 3). The appellant’s appeal succeeded on two questions of law. First, this Court decided that the departure from the notice identified in the Court’s reasons (at [53]) was not fatal to the jurisdiction under s 108 of the *Migration Act 1958* (Cth) (“the Migration Act”) to decide that there had been non-compliance with a relevant section in the Act. Secondly, this Court decided that the Federal Magistrates Court had erred in deciding that the Tribunal’s letter to the first respondent did not comply with s 359A of the Migration Act.

4 4 The Federal Magistrates Court had made two declarations as part of the orders which were the subject of the appeal. On the hearing of the appeal, the Court was told by senior counsel for the appellant that the first declaration had not been sought in the Federal Magistrates Court, and that the declaration had “wide implications because it stands as a declaration as to the operation of the Act in respect of this system”. Although this Court did not decide whether the first respondent had submitted the bogus document to an authorised system, the Court did set aside the orders made by the Federal Magistrates Court including the declaration which was said to have “wide implications”.

5 5 The power in s 6(1) of the *Federal Proceedings (Costs) Act 1981* has been enlivened.

6 6 The discretion conferred by the subsection is a broad one: *Minister for Immigration and Citizenship v SZNVW (No 3)* [2010] FCAFC 102; *Minister for Immigration and Citizenship v Khadgi (No 2)* [2010] FCAFC 152. In the former decision, the Full Court identified some of the relevant considerations. It seems to us that the application of those

considerations to the facts of this case leads to the conclusion that a costs certificate should be granted. First, there are no matters disentitling the first respondent from the issue of such a certificate. Secondly, the issues raised in the appeal were important, as is apparent from what we said earlier. Thirdly, it is relevant to note that public interest criterion 4004, found in Schedule 4 to the *Migration Regulations 1994* (Cth), provides that many non-protection visas may be refused if an applicant has outstanding debts to the Commonwealth.

7 7 The Court will make an order that the first respondent be granted a certificate to the effect that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under the *Federal Proceedings (Costs) Act 1981* (Cth) to the first respondent. This payment will be in respect of the costs incurred by him in relation to the appeal and any costs incurred by the Minister in relation to the appeal that are required to be paid by the respondent pursuant to order 4 made by this Court on 21 March 2012.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Greenwood and Besanko.

Associate:

Dated: 9 May 2012